Suruhanjaya Pasukan Polis & Ors v Melvindar Singh a/l Gamum Singh

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-01(A)-437–09 OF 2020
LEE SWEE SENG, HADHARIAH SYED ISMAIL AND SUPANG LIAN JJCA
15 OCTOBER 2021

Administrative Law — Judicial review — Dismissal of public servant — Police officer terminated after probationary period — Whether respondent had right to be heard before probationary service terminated — Whether reasons for termination must be given — Whether respondent entitled to be given copy of head of department's letter — Whether it was mandatory for appellant to consider letters of support by superior officer — Whether respondent entitled to be confirmed in service — Whether decision was justiciable

This was an appeal against the decision of the High Court which allowed the respondent's application for judicial review application. The respondent was appointed as a probationary inspector of police. His appointment was subject to the following terms: (a) he had to serve a probation period between 1–3 years; and (b) his employment could be terminated if he failed to be confirmed in service. The respondent served out his duties as a probationary police officer from 8 February 2013 to 8 February 2016. His probation period was then extended with penalty from 8 February 2016 to 8 February 2018. Vide a letter dated 14 February 2018, the first appellant, gave the respondent an opportunity to show cause as to why his probationary service should not be terminated on the grounds: (i) the respondent failed to be confirmed in service during the probation period; and (ii) the head of department did not certify his confirmation. The respondent was given 14 days to send his representation letter to the first appellant. The respondent sent his letter of representation dated 8 April 2018 to the first appellant in which he confessed of having sub-standard work performance and poor level of discipline including criminal misconduct and that he would improve his performance. Vide a letter dated 8 June 2018, the first appellant terminated the respondent's service pursuant to reg 50(1) of the Public Officers (Appointment, Promotion and Termination of Service) Regulations 2012 ('Regulation 2012'). Aggrieved with the decision of the first appellant, the respondent filed a judicial review application for leave for an order of certiorari to quash the first appellant's termination of his service and for an order of mandamus to reinstate him as a probationary inspector of police, payment of salaries and allowances, damages and costs. The grounds of the application were as follows: (A) he was not given a right to be heard before his probationary service was terminated; (B) he was not informed of the reason

for termination; (C) he had fulfilled all the conditions for confirmation of appointment; and (D) he was not given sufficient time to answer the show cause letter before his probationary service was terminated. On 30 July 2020, the High Court allowed the judicial review application and held that the appellants' decision was tainted with irrationality and procedural impropriety. On appeal, the issues that arose for determination were: (1) whether the first appellant must give reasons for the termination; (2) whether the respondent was entitled to be given a copy of the head of department's letter dated 6 November 2017; (3) whether it was mandatory for the first appellant to consider the letters of support issued by the respondent's superior officer; (4) whether the respondent was entitled to be confirmed in service after serving as a probationary inspector of police for five years and four months; and (5) whether the decision of the first appellant was justiciable.

Held, allowing the appeal with costs:

(1) Regulation 50(1) only stated that the first appellant may terminate a probation officer who failed to be confirmed during probation period. There was no added duty on the first appellant to state: (a) the reasons why the respondent was not confirmed; and (b) to state the reasons why the head of department refused to confirm the respondent. In the present case, the respondent's head of department had certified not to confirm his service. Therefore, the first appellant's reason for terminating the respondent was his failure to be confirmed. The court was of the view that in holding that both the first appellant and the respondent's head of department had to give reasons for the termination and refusal to confirm, the learned High Court judge ('HCJ') had imposed an extraneous duty on the first appellant and the head of department when such duty did not exist in law nor it was stated in reg 50(1). In this regard, the court found that the learned HCJ had erred in law and in fact. The respondent's termination was done in accordance with the terms of his appointment and was procedurally right (see para 23).

(2) Regulation 29(4) expressly stated that the head of department was to submit the certification to the first appellant and to no one else. For this purpose, only the first appellant was required to look at and consider the certification. By imposing a duty on the first appellant to give a copy of the certification to the respondent, the learned HCJ had added words to reg 29(4) and by implication added extra duty on the first appellant when that was not the intention of Regulation 2012. In the circumstances, the approach adopted by the HCJ was erroneous. The court further agreed that it was not incumbent on the first appellant to consider the two support letters for the respondent's performance. It was well within the prerogative of the first appellant to accept the certification of the head of department (see paras 32 & 36).

(3) Based on reg 31, it was erroneous for the HCJ to rule that simply because the respondent had served and was not terminated during the initial probation period of three years, therefore the respondent was presumed to have been confirmed in service. There was no such thing as a presumption of confirmation in service. A probationary officer must actually and formally be confirmed in service by the first appellant. In the present case, there was no denial that the first appellant did not confirm the respondent in service. Even if the respondent had fulfilled all the requirements for confirmation, it did not mean he was entitled to confirmation. Fulfillment of conditions of service merely placed the respondent as an eligible candidate for confirmation. In the circumstances, the court found that there was merit in the points raised by the appellants. The HCJ had failed to apply the law correctly (see paras 39 & 41).

(4) Whilst the decision to confirm or not to confirm the respondent in service rested solely with the first appellant, the court disagreed that the first appellant's decision could not be challenged in court. It was trite law that the court did not recognise absolute or unfettered discretion. In the present case, the respondent had suffered losses as a result of the termination. His livelihood was affected. Surely, he was entitled to challenge the first appellant's decision on the grounds of irrationality, procedural impropriety, illegality and unreasonableness. Accordingly, the court was of the considered view that the first appellant's decision was justiciable (see para 43).

[Bahasa Malaysia summary

Ini adalah rayuan terhadap keputusan Mahkamah Tinggi yang membenarkan permohonan responden untuk permohonan semakan kehakiman. Responden telah dilantik sebagai inspektor percubaan polis. Pelantikannya adalah tertakluk kepada syarat-syarat berikut: (a) beliau perlu menjalani tempoh percubaan antara 1–3 tahun; dan (b) pekerjaannya boleh ditamatkan sekiranya dia gagal disahkan dalam perkhidmatan. Responden menjalankan tugasnya sebagai pegawai polis percubaan dari 8 Februari 2013 hingga 8 Februari 2016. Tempoh percubaan kemudiannya dilanjutkan dengan penalti dari 8 Februari 2016 hingga 8 Februari 2018. Melalui surat bertarikh 14 Februari 2018, perayu pertama, memberi peluang kepada responden untuk menunjukkan sebab mengapa perkhidmatan percubaannya tidak ditamatkan atas alasan: (i) responden gagal disahkan dalam perkhidmatan semasa tempoh percubaan; dan (ii) ketua jabatan tidak mengesahkan pengesahannya. Responden diberi 14 hari untuk menghantar surat representasinya kepada perayu pertama. Responden menghantar surat representasi bertarikh 8 April 2018 kepada perayu pertama di mana dia mengakui mempunyai prestasi kerja yang tidak memuaskan dan tahap disiplin yang lemah termasuk salah laku jenayah dan dia berjanji untuk meningkatkan prestasinya. Melalui surat bertarikh 8 Jun 2018,

perayu pertama telah menamatkan perkhidmatan responden menurut peraturan 50(1) Peraturan-Peraturan Pegawai Awam (Pelantikan, Kenaikan Pangkat dan Penamatan Perkhidmatan) 2012 ('Peraturan 2012'). Terkilan dengan keputusan perayu pertama, responden telah memfailkan permohonan kebenaran semakan kehakiman untuk perintah certiorari membatalkan penamatan perkhidmatan perayu pertama dan untuk perintah mandamus untuk mengembalikan jawatannya sebagai inspektor percubaan polis, pembayaran gaji dan elaun, ganti rugi dan kos. Alasan permohonan tersebut adalah seperti berikut: (A) dia tidak diberi hak untuk didengar sebelum perkhidmatan percubaannya ditamatkan; (B) dia tidak dimaklumkan sebab penamatan; (C) dia telah memenuhi semua syarat untuk pengesahan pelantikan; dan (D) dia tidak diberi masa yang mencukupi untuk menjawab surat tunjuk sebab sebelum perkhidmatan percubaannya ditamatkan. Pada 30 Julai 2020, Mahkamah Tinggi membenarkan permohonan semakan kehakiman dan berpendapat bahawa keputusan perayu adalah tidak rasional dan kesalahan prosedur. Isu-isu yang timbul di rayuan ini adalah: (1) sama ada perayu pertama harus memberi alasan untuk penamatan tersebut; (2) sama ada responden berhak diberi salinan surat oleh ketua jabatan bertarikh 6 November 2017; (3) sama ada perayu pertama harus mempertimbangkan surat sokongan yang dikeluarkan oleh pegawai atasan responden; (4) sama ada responden berhak untuk disahkan dalam perkhidmatan selepas berkhidmat sebagai inspektor percubaan polis selama lima tahun dan empat bulan; dan (5) sama ada keputusan perayu pertama adalah wajar.

Diputuskan, membenarkan rayuan dengan kos:

(1) Peraturan 50(1) hanya menyatakan bahawa perayu pertama boleh menamatkan pegawai percubaan yang gagal disahkan semasa tempoh percubaan. Tiada kewajipan tambahan ke atas perayu pertama untuk menyatakan: (a) sebab-sebab mengapa responden tidak disahkan; dan (b) untuk menyatakan sebab-sebab mengapa ketua jabatan enggan mengesahkan responden. Di dalam kes ini, ketua jabatan responden telah menyatakan untuk tidak mengesahkan perkhidmatannya. Oleh itu, alasan perayu pertama untuk menamatkan responden adalah kegagalan untuk mengesahkan jawatannya. Mahkamah ini berpendapat bahawa keputusan hakim Mahkamah Tinggi ('HMT') untuk mengenakan tanggungjawab kepada perayu pertama dan ketua jabatan responden untuk memberi alasan penamatan dan keengganan untuk mengesahkan jawatan tersebut tidak wujud dalam undang-undang atau dalam perkara 50(1). Di dalam hal ini, mahkamah mendapati bahawa HMT yang terpelajar telah terkhilaf di dalam undang-undang. Penamatan responden dilakukan menurut terma pelantikannya dan mengikut prosedur yang betul (lihat perenggan 23).

(2) Peraturan 29(4) dengan jelas menyatakan bahawa ketua jabatan adalah untuk memberikan pengesahan kepada perayu pertama sahaja. Untuk

tujuan ini, hanya perayu pertama yang dikehendaki menerima dan mempertimbangkan pengesahan tersebut. Dengan mengenakan kewajipan ke atas perayu pertama untuk memberikan salinan pengesahan kepada responden, HMT yang terpelajar telah mengubah perkara 29(4) dan menambah tugas tambahan ke atas perayu pertama yang mana ianya bukan tujuan Peraturan 2012. Di dalam keadaan ini, HMT adalah terkhilaf. Mahkamah ini juga bersetuju bahawa bukan tanggungjawab perayu pertama untuk meneliti kedua-dua surat sokongan untuk prestasi responden. Adalah di dalam prerogatif perayu pertama untuk menerima pengesahan ketua jabatan (lihat perenggan 32 & 36).

(3) Berdasarkan perkara 31, HMT terkhilaf ketika memutuskan bahawa hanya kerana responden telah berkhidmat dan tidak ditamatkan semasa tempoh percubaan awal tiga tahun, oleh itu responden dianggap telah disahkan dalam perkhidmatan. Prinsip seperti anggapan pengesahan dalam perkhidmatan adalah tidak wujud. Seorang pegawai percubaan harus secara rasmi disahkan dalam perkhidmatan oleh perayu pertama. Di dalam kes ini, tiada penafian bahawa perayu pertama tidak mengesahkan responden dalam perkhidmatan. Walaupun responden telah memenuhi semua syarat untuk pengesahan, itu tidak bermakna dia berhak mendapat pengesahan. Memenuhi syarat-syarat perkhidmatan hanya meletakkan responden sebagai calon yang layak untuk pengesahan. Dalam keadaan ini, mahkamah ini mendapati bahawa terdapat merit di dalam hujahan oleh perayu. HMT telah terkhilaf menafsirkan undang-undang dengan betul (lihat perenggan 39 & 41).

(4) Walaupun keputusan untuk mengesahkan responden dalam perkhidmatan terletak di atas perayu pertama, mahkamah tidak bersetuju bahawa keputusan perayu pertama tidak boleh dicabar di mahkamah. Adalah menjadi undang-undang mantap bahawa mahkamah tidak mengiktiraf budi bicara mutlak atau budibicara yang tidak dihadkan. Di dalam kes ini, responden telah terjejas akibat penamatan tersebut. Kehidupannya telah terjejas. Sudah tentu, dia berhak untuk mencabar keputusan perayu pertama yang tidak rasional, prosedur salah, menyalahi undang-undang dan tidak munasabah. Oleh itu, mahkamah berpendapat bahawa keputusan perayu pertama adalah wajar (lihat perenggan 43).]

Cases referred to

Abd Rauf bin Alif v Suruhanjaya Pasukan Polis & Anor [2003] 1 MLJ 18, CA (refd)

Ghazi bin Mohd Sawi v Mohd Haniff bin Omar, Ketua Polis Negara, Malaysia & Anor [1994] 2 MLJ 114; [1994] 2 CLJ 333, SC (refd)

Government of Malaysia v Lionel [1974] 1 MLJ 3; [1973] 1 LNS 37, PC (refd)

Rasiah Munusamy v Public Services Commission [1967] 1 AC 348, PC (refd)

A *Shaffarizan bin Mohamad v Government of Malaysia c/o Attorney Generals Chambers & Anor* [2015] 7 MLJ 504; [2014] 1 LNS 490, HC (refd)

Legislation referred to

Federal Constitution art 140

B Public Officers (Appointment, Promotion and Termination of Service) Regulations 2012 regs 29, 29(4), 31, 31(2), 50(1), 52

Appeal from: Application for Judicial Review No WA-25–307–10 of 2018 (High Court, Kuala Lumpur)

C

Maslifah bt Ayob (Senior Federal Counsel, Attorney General's Chambers) for the appellants.

Faid Naraendran bin S Thiagarajah (with Ivan Ang and Ishraf Hashim) (Naraendran & Partners) for the respondent.

D

Hadhariah Syed Ismail JCA:

INTRODUCTION

E **[1]** On 30 July 2020, the High Court quashed the order of the Police Force Commission terminating the respondents service and ordered for him to be restored as probationary Inspector of Police. This is the appellants' appeal against the said decision of the High Court.

F **[2]** We heard and allowed the appeal on 7 September 2021. Our reasons are as follows.

BACKGROUND FACTS

G **[3]** The respondent was appointed as a probationary Inspector of Police via *Surat Tawaran Pelantikan* dated 30 January 2013. His appointment is subject to the following terms: (a) he had to serve a probation period between 1–3 years; and (b) his employment can be terminated if he fails to be confirmed in service.

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[4] The respondent served out his duties as probationary police officer from 8 February 2013 to 8 February 2016. His probation period was then extended with penalty from 8 February 2016 to 8 February 2018.

I **[5]** Vide a letter dated 14 February 2018, the first appellant ie the Police Force Commission ('the Commission') gave the respondent an opportunity to show cause as to why his probationary service shall not be terminated on the grounds:

(a) the respondent failed to be confirmed in service during the probation period; and

(b) Head of Department did not certify his confirmation.

The respondent was given 14 days to send his representation letter to the Commission.

[6] On 12 March 2018, a memo was issued by Ketua Bahagian Siasatan Jenayah Daerah Ipoh to the respondent for purposes of confirmation of position and the respondent was asked to forward the required documents. The respondent, by letter dated 4 April 2018 had forwarded all the required documents to IPD Ipoh.

[7] The respondent sent his letter of representation dated 8 April 2018 to the Commission in which he confessed of having substandard work performance and poor level of discipline including criminal misconduct and that he would improve his performance. His representation was supported by letters from: (a) Ketua Polis Daerah Ipoh ACP Mohd Ali bin Hj Tamby; and (b) Ketua Bahagian Siasatan Jenayah IPD Ipoh DSP Rasdi bin Ariffin.

[8] Vide a letter dated 8 June 2018, the Commission terminated the respondent's service effective 31 May 2018 pursuant to reg 50(1) of the Public Officers (Appointment, Promotion and Termination of Service) Regulations 2012. The respondent received the notice on 10 July 2018.

[9] Aggrieved with the decision of the Commission, the respondent filed a judicial review for leave for an order of certiorari to quash the Commission's termination of his service and for an order of mandamus to reinstate him as probationary Inspector of Police, payment of salaries and allowances, damages and costs. The grounds of the application are as follows:

(a) he was not given a right to be heard before his probationary service was terminated;

(b) he was not informed of the reason for termination;

(c) he has fulfilled all the conditions for confirmation of appointment; and

(d) he was not given sufficient time to answer the show cause letter before his probationary service was terminated.

[10] On 26 April 2019, the learned High Court judge refused the application for leave with no order as to costs. On 21 August 2019, the Court of Appeal reversed the High Court's decision, granted leave for judicial review and ordered the appellants to give explanation for terminating the respondent.

[11] On 30 July 2020, the High Court allowed the judicial review application.

THE HIGH COURT'S DECISION

[12] The High Court held that the appellants' decision was tainted with irrationality and procedural impropriety on the following grounds:

(a) the Commission failed to provide reasons as to why the respondent's service was not confirmed within the probation period and why the Head of Department did not certify his confirmation;

(b) the Commission's decision is flawed because the respondent was not given a copy of the Head of Department's letter dated 6 November 2017;

(c) the Commission failed to take into consideration the letters of support issued by the respondent's superior officers;

(d) the respondent ought to have been confirmed in service because he has served beyond the initial probation period; and

(e) issue of termination of service is justiciable.

THE ISSUES

[13] Arising from the High Court's decision, the issues for determination are:

(a) whether the Commission must give reasons for the termination;

(b) whether the respondent is entitled to be given a copy of the Head of Department's letter dated 6 November 2017;

(c) whether it is mandatory for the Commission to consider the letters of support issued by the respondent's superior officer;

(d) whether the respondent is entitled to be confirmed in service after serving as a probationary Inspector of Police for five years four month (from 8 February 2013 to 31 May 2018); and

(e) whether the decision of the Commission is justiciable.

The first issue: Reasons for the termination

[14] In this case, the respondent's employment was terminated in accordance with the terms of his appointment as stated in para 5.1 and 5.5 of the *Surat Tawaran Pelantikan* which reads as follows:

Syarat-Syarat Perkhidmatan

5. Pelantikan anda adalah dikenakan syarat-syarat perkhidmatan seperti berikut:- A

5.1 Berkhidmat dalam tempoh percubaan selama 1 hingga 3 tahun.

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5.5 Perkhidmatan anda boleh ditamatkan sekiranya gagal disahkan dalam perkhidmatan mengikut peraturan-peraturan yang berkuatkuasa dari semasa ke semasa. B

[15] The Regulation in force for the termination of probationary service is Public Officers (Appointment, Promotion and Termination of Service) Regulations 2012 ('Regulation 2012'). C

[16] Regulation 50(1) states:

50 Termination of service of an officer who fails to be confirmed

(1) Subject to sub-regulation (2), the Yang DiPertuan Agong may terminate the service of an officer who is on probation for his appointment who has failed to be confirmed in service during the probation period, whether the initial probation period or its extension. D

[17] Regulation 52 states the procedure for termination as follows: E

52 Opportunity to show cause

The service of an officer shall not be terminated under regulation 48 and 49 and sub-regulations 50(1) and (2) unless the officer has been given the opportunity to show cause, within a period of not less than fourteen days from the date of receipt of notice to show cause, as to why his service shall not be terminated. F

[18] In *Government of Malaysia v Lionel* [1974] 1 MLJ 3; [1973] 1 LNS 37, the Privy Council held that the termination of a temporary employee was validly made by the Government in accordance with the terms of his engagement. This is what Viscount Dilhorne said at p 5 (MLJ); p 51 (CLJ): G

Under English law, a servant may be summarily dismissed for disobedience to orders or misconduct or may have his employment terminated by notice or the payment of wages in lieu of notice. Under the laws of Malaysia, a similar distinction between dismissal and termination of services appears to exist and in their Lordships opinion there is nothing in the Constitution which affects the right of the Government to terminate employment in accordance with the terms of the engagement. H

[19] In *Abd Rauf bin Alif v Suruhanjaya Pasukan Polis & Anor* [2003] 1 MLJ 18, the Court of Appeal applied the legal principle laid down by the Privy Council *Government of Malaysia v Lionel* and upheld the decision of the Commission of Police that terminated the appellant's probationary service. I

[20] Following from the Privy Council's decision in *Lionel*'s case, our courts

A have consistently held that a probationer's employment can be terminated in accordance with the terms of the engagement (see *Rasiah Munusamy v Public Services Commission* [1967] 1 AC 348; *Shaffarizan bin Mohamad v Government of Malaysia c/o Attorney Generals Chambers & Anor* [2015] 7 MLJ 504; [2014] 1 LNS 490).

B

[21] The show cause letter dated 14 February 2018 issued to the respondent reads as follows:

> TINDAKAN PENAMATAN PERKHIDMATAN DI BAWAH PERATURAN 50(1) DAN 52, PERATURAN-PERATURAN PEGAWAI AWAM (PELANTIKAN, KENAIKAN PANGKAT DAN PENAMATAN PERKHIDMATAN) 2012
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> Adalah saya diarahkan memaklumkan bahawa Jawatan kuasa Pelantikan dan Kenaikan Pangkat Bil. 1/2018, Suruhanjaya Pasukan Polis pada 13 Februari 2018 telah membuat keputusan untuk mengambil tindakan penamatan perkhidmatan terhadap tuan di bawah Peraturan 50(1) Peraturan-Peraturan Pegawai Awam (Pelantikan, Kenaikan Pangkat dan Penamatan Perkhidmatan) 2012 kerana gagal disahkan dalam perkhidmatan semasa tempoh percubaan.
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> 2. Satu laporan telah diterima oleh Suruhanjaya Pasukan Polis daripada Ketua Jabatan bahawa tuan berdasarkan perkara-perkara berikut:-
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> i) Gagal untuk disahkan dalam perkhidmatan semasa tempoh percubaan yang ditetapkan, dan
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> ii) Ketua Jabatan tidak menyokong pengesahan dalam perkhidmatan pegawai.
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> 3. Berdasarkan Peraturan 52, Peraturan-Peraturan Pegawai Awam (Pelantikan, Kenaikan Pangkat dan Penamatan Perkhidmatan) 2012, tuan adalah diminta membuat satu representasi secara bertulis yang mengandungi alasan-alasan yang tuan hendak gunakan untuk membuktikan mengapa perkhidmatan tuan tidak boleh ditamatkan. Representasi tersebut hendaklah dikemukakan kepada Suruhanjaya Pasukan Polis melalui Ketua Polis Negara dalam tempoh 14 hari daripada tarikh tuan menerima surat ini. Sekiranya tuan tidak membuat representasi tersebut dalam tempoh yang ditetapkan itu, tuan akan dianggap sebagai tidak membela diri dan perkara ini akan terus diputuskan oleh Suruhanjaya Pasukan Polis berdasarkan keterangan-keterangan yang sedia ada sahaja.

C D E F G H

[22] It is observed that the respondent's termination was made under reg 50(1) of Regulation 2012 for failure to be confirmed in service during his probationary period. Senior federal counsel ('SFC') for the appellants submitted that the High Court judge has erred in law in holding that the Commission has failed to state the reasons for the respondent's termination and to state the reasons of the Head of Department's refusal to confirm the respondent. It is submitted that the Commission's reasons for the termination is in accordance with reg 50(1) of Regulation 2012. It is also submitted that neither the Commission nor the Head of Department has a duty under the law

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to give reasons to the respondent. In response to SFC's submission, counsel for the respondent merely submitted that the High Court judge's decision is correct.

[23] We agree with SFC's submission. Regulation 50(1) only states the Commission may terminate a probation officer who failed to be confirmed during probation period. There is no added duty on the Commission to state: (i) the reasons why the respondent was not confirmed; and (ii) to state the reasons why the Head of Department refused to confirm the respondent. In the present case, the respondent's Head of Department has certified not to confirm his service. Therefore, the Commission's reason for terminating the respondent is his failure to be confirmed. In our view, in holding both the Commission and the respondent's Head of Department had to give reasons for the termination and refusal to confirm, the learned High Court judge had imposed extraneous duty on the Commission and the Head of Department when such duty does not exist in law nor it is stated in reg 50(1). In this regard, we find the learned High Court judge has erred in law and in fact. Instead, we find the respondent's termination was done in accordance with the terms of his appointment and was procedurally right.

[24] However, the reason why the Head of Department refused to certify the respondent's confirmation was made known for the first time by the former Inspector General of Police, Tan Sri Dato' Sri Mohamad Fuzi bin Harun in his affidavit in reply affirmed on 16 October 2019. In para 7 of the said affidavit, the former IGP avers:

> 7. Saya sesungguhnya percaya dan menyatakan bahawa Suruhanjaya telah memutuskan untuk menamatkan perkhidmatan pemohon atas alasan:
>
> 7.1 Pemohon gagal untuk disahkan dalam perkhidmatan sebelum tempoh percubaannya tamat;
>
> 7.2 Pemohon tidak diperakukan layak dan sesuai untuk disahkan dalam perkhidmatan oleh Ketua Jabatannya berikutan prestasi kerja dan tahap disiplin yang tidak memuaskan.

[25] As a matter of fact, the respondent knew and realised that he had unsatisfactory work performance and discipline issues. In his plea to the Commission, he had admitted his mistakes and shortcomings including poor work performances, criminal misconduct and disciplinary issues that led to the Head of Department's refusal to certify his confirmation in service. At paras 3 and 6 of his letter to the Commission (pp 167–168 of encl 3), the respondent states:

> 3. Terlebih dahulu saya akui kesilapan yang telah saya lakukan sehingga saya gagal untuk disahkan dalam perkhidmatan semasa tempoh percubaan yang telah ditetapkan di mana Ketua Jabatan saya juga tidak menyokong pengesahan jawatan saya di dalam perkhidmatan. Namun, saya telah sedaya upaya memperbaiki

A kelemahan diri saya dan sepanjang hampir satu tahun saya bertugas di Cawangan D11 (seksual) pada 20.3.2017, saya tidak lagi melakukan sebarang perlanggaran jenayah dan juga tiada melakukan sebarang salah laku sehingga ke hari ini. Saya telah dapat mengekalkan mutu disiplin yang baik dalam penugasan saya. Tiada sebarang rungutan atau aduan dari orang awam terhadap saya sepanjang saya
B bertugas di Cawangan D11. Saya telah dapat mengekalkan prestasi saya sehingga hari ini.

...

6. Di sini, saya dengan rasa rendah diri memohon jutaan ampun dan maaf serta merayu dengan sepenuh hati agar saya diberi peluang kali terakhir untuk tidak
C ditamatkan perkhidmatan. Saya sanggup berjumpa dengan kaunselor pada setiap bulan bagi khidmat sesi kaunseling sekiranya pihak IPD Ipoh mahu agar saya dapat dibuat pemantauan dari segi prestasi dan tingkah laku saya. Saya berjanji akan menjaga prestasi kerja saya dengan sebaik mungkin jika saya dapat diberi peluang terakhir untuk meneruskan perkhidmatan saya di dalam Pasukan Polis Diraja
D Malaysia.

[26] Hence, quite apart from there being no requirement for the Commission to state the reasons why the Head of Department did not certify his confirmation in service, the respondent in any case, knew full well he was
E not confirmed because he is not fit to be appointed as a permanent police officer due to his bad behaviour, poor work performance and disciplinary issues. As such, his complaint that the Commission failed to state the reasons has no merit.

F *Second issue: Whether the respondent is entitled to be given the Head of Department's letter dated 6 November 2017*

[27] The Head of Department's letter dated 6 November 2017 refers to the certification by Ketua Polis Negeri Perak not to confirm the respondent. This
G letter was not mentioned in the show cause letter dated 14 February 2018. But, its existence was first mentioned in the affidavit in reply dated 16 October 2019, affirmed by the former Inspector General of Police, Tan Sri Dato' Sri Mohamad Fuzi bin Harun.

H **[28]** In para 6.3 of the said affidavit, the former IGP averred:

6.3 Melalui surat bertarikh 6.11.2017, SPP telah menerima suatu perakuan di bawah subperaturan 29 (2) Peraturan-Peraturan Pegawai Awam (Pelantikan, Kenaikan Pangkat dan Penamatan Perkhidmatan) 2012 [Peraturan 2012] daripada Ketua Jabatan Pemohon iaitu Dato' Pahlawan Hasnan bin Hassan, Ketua Polis
I Perak (kini mantan) yang tidak memperakukan pengesahan perkhidmatan pemohon.

[29] It is not in dispute that the letter dated 6 November 2017 was never exhibited in the former IGP's affidavit.

[30] It is without doubt that the letter dated 6 November 2017 is a certification from the respondent's Head of Department, issued under reg 29(4) of Regulation 2012 which reads:

> (4) If an officer is not certified to be confirmed in service, the Head of Department shall submit to the Commission a certification not to confirm the officer in service as set out in the Third Schedule.

[31] The learned High Court judge held that the Commission's decision was tainted with irrationality when the Head of Department's certification dated 6 November 2017 was not given to the respondent. SFC submitted that the learned High Court judge has erred in holding so because the certification submitted under reg 29(4) is an internal communication between the Head of Department and the Commission. It is submitted that there is no duty under the law that requires the Commission or the Head of Department to give a copy of the certification to the respondent. It is further submitted that the High Court judge in imposing an obligation on the Commission to give a copy of the Head of Department's certification to the respondent has added a duty not provided for under the law. Reference was made to the case of *Ghazi bin Mohd Sawi v Mohd Haniff bin Omar, Ketua Polis Negara, Malaysia & Anor* [1994] 2 MLJ 114; [1994] 2 CLJ 333, where the Supreme Court cautioned the courts against adding words into legislation. Hence, SFC submitted the Commission cannot be said to have breached a duty where none exists in law.

[32] We agree with SFC's submission. Regulation 29(4) expressly states that the Head of Department is to submit the certification to the Commission and to no one else. This is understood because it is the Commission who determines whether to terminate or confirm the respondent. For this purpose, only the Commission is required to look at and consider the certification. By imposing a duty on the Commission to give a copy of the certification to the respondent, the learned High Court judge has added words to reg 29(4) and by implication added extra duty on the Commission when that is not the intention of Regulation 2012. In the circumstances, it is our view that the approach adopted by the High Court judge is erroneous and Her Ladyship had applied the law wrongly.

Third issue: Whether it is compulsory for the Commission to consider the two support letters from the respondent's immediate superiors

[33] The respondent tendered two letters of support from his immediate superior together with his representation's letter to the Commission. The first support letter dated 10 April 2018 is from Mohd Ali bin Hj Tamby, Ketua Polis Daerah Ipoh. Paragraph 3 of the said letter states:

> 3. Sepanjang saya menjadi Ketua Polis Daerah Ipoh bermula 1.11.2017 sehingga kini, saya tidak mendapat sebarang aduan salahlaku tatatertib terhadap pegawai ini.

A Oleh yang demikian, saya sebagai Ketua Polis Daerah Ipoh menyokong surat representasi pegawai ini untuk tidak ditamatkan perkhidmatan beliau.

[34] The second support letter, also dated 10 April 2018 is from Ketua Bahagian Siasatan Jenayah Daerah Ipoh, Rasdi bin Ariffin. Rasdi bin Ariifin serves as Ketua Bahagian Siasatan Jenayah Daerah Ipoh from 16 March 2017 until 30 November 2019. Paragraph 4 of the said letter states:

4. Saya sebagai Ketua Bahagian Siasatan Jenayah Daerah Ipoh menyokong agar Inspektor Percubaan Melvindar Singh a/l Gamum Singh dapat diberi peluang terakhir untuk tidak ditamatkan perkhidmatan memandangkan semenjak beliau bertugas di Cawangan D11 (Seksual) dari tarikh 20.3.2017 hingga ke hari ini, tiada berlaku sebarang kesalahan jenayah, perlanggaran disiplin atau komplen dari mana-mana pihak terhadap pegawai ini.

[35] It is not in dispute that the Commission did not consider the two letters of support. Accordingly, the High Court judge held that the Commission's decision was irrational for not getting further clarification from the Head of Department in respect of the two letters of support. SFC submitted the High Court judge has erred in law and in fact in holding the Commission's decision is tainted with irrationality for the following reasons:

(a) for the purpose of Regulation 2012, the respondent's Head of Department/Pegawai Memerintah is Ketua Polis Perak and not his two immediate superiors;

(b) Ketua Polis Perak as the Head of Department has submitted his certification under reg 29(4) on 6 November 2017 not to confirm the respondent and the Commission had acted upon that certification by issuing the show cause letter dated 14 February 2018;

(c) the two support letters were written after the Head of Department had issued the certification and after the Commission had acted upon that certification;

(d) the letters of support cannot supersede the Head of Department's certification. Both Mohd Ali bin Hj Tamby and Rasdi bin Ariffin had affirmed an affidavit stating their support letters are not certification by the Head of Department for the purpose of Regulations 2012;

(e) both Mohd Ali bin Hj Tamby and Rasdi bin Ariffin also averred in their respective affidavit that they had no knowledge of the respondent's prior work performance and conduct that led the Ketua Polis Perak refusal to certify him for confirmation;

(f) the two immediate superiors were unaware of the Head of Department's certification that was already submitted to the Commission when they wrote the support letter; and

(g) the Head of Department had the respondent under observation for three years (the initial probation period) and the additional two years (the extended probation period) for purpose of certification for confirmation in service. Whereas, the Ketua Polis Daerah Ipoh and Ketua Bahagian Siasatan Jenayah Daerah Ipoh only began supervising the respondent for a period of about three months and 16 months respectively.

[36] Against this background, we agree with SFC that it is not incumbent on the Commission to consider the two support letters. It is well within the prerogative of the Commission to accept the certification of the Head of Department.

Fourth issue: Whether the respondent is entitled to confirmation

[37] The appellants raised three points under this heading. Firstly, the High Court judge has erred in holding that the respondent is entitled to confirmation because he has served beyond the initial probation period. Secondly, the High Court judge has erred in making an inference that since the respondent was not terminated during the initial probation period, the respondent is entitled to confirmation in service. Thirdly, the High Court judge has erred in holding that since the respondent has satisfied most of the requirements to be confirmed in service namely he had passed the Peperiksaan Perkhidmatan Undang-Undang Tinggi Pasukan, had attended all the mandatory courses and that his urine was tested negative for drugs, he ought to be confirmed in service.

[38] It is not disputed that from 8 February 2013 up to the date the Commission issued the show cause letter dated 14 February 2018, the respondent's position remained unchanged. He was still a probationary officer. He was still not confirmed in service. The position of probationers under Regulation 2012 is clear. Unless and until they are confirmed in service, they remain as probationers. Regulation 31 states:

31 Date of confirmation

(1) The date of confirmation in service of an officer is the first day after the date the officer has complied with all the conditions prescribed for confirmation.

(2) An officer shall be deemed to be on probation until the officer is confirmed in service by the Commission, even if the officer has already complied with all the conditions prescribed for confirmation.

[39] Based on reg 31, it is erroneous for the High Court judge to rule that simply because the respondent has served and was not terminated during the

initial probation period of three years, therefore the respondent is presumed to have been confirmed in service. We agree with SFC that there is no such thing as presumption of confirmation in service. The law as it stands today is a probationary officer must actually and formally be confirmed in service by the Commission. In the present case, there is no denial that the Commission did not confirm the respondent in service. We also agree with SFC that even if the respondent has fulfilled all the requirement for confirmation, it does not mean he is entitled to confirmation. Fulfillment of conditions of service merely place the respondent as an eligible candidate for confirmation. This is stated in reg 29 as follows:

> 29 (1) An officer on probation who has fulfilled all the conditions specified in the scheme of service or such other conditions as determined by the Yang Di-Pertuan Agong from time to time is eligible for confirmation in service by the Commission.

[40] In *Rasiah Munusamy v Public Services Commission* [1967] 1 AC 348, the Privy Council held 'Eligible for' is not equivalent to 'entitled to' and means no more than 'fit to be chosen for'.

[41] In the circumstances, we find there is merit in the points raised by the appellants. We find the High Court judge has failed to apply the law correctly.

Fifth issue: Whether termination of service of probationary officer is justiciable

[42] The learned High Court judge held that the respondent's termination can be challenged in judicial review proceedings. SFC submitted the ruling of the High Court judge is erroneous. It is submitted that art 140 of the Federal Constitution has vested the powers on the appointment, confirmation and exercise of disciplinary control over the members of the police force to the Commission. Therefore, it is submitted that it is the Commission that needs to satisfy itself whether a probation officer deserves to be retained in the police force as a permanent police officer. It is submitted that it is not open to the court to sit in the place of the Commission and try to determine if it would come to the same conclusion of the Commission. Accordingly, SFC submitted that the Commission's decision in respect of confirmation of service and termination of service is not justiciable and the judicial review ought to have been dismissed.

[43] Whilst we agree with SFC that the decision to confirm or not to confirm the respondent in service rest solely with the Commission, we disagree that the Commission's decision cannot be challenged in court. The fact that the third appellant had issued a letter dated 24 August 2018 to the respondent, advising him to file judicial review runs counter to the appellants' submission. It is trite law that the court does not recognise absolute or unfettered discretion. In the present case, the respondent has suffered losses as a result of the termination.

His livelihood is affected. Surely, he is entitled to challenge the Commission's decision on the ground of irrationality, procedural impropriety, illegality and unreasonableness. Accordingly, it is our considered view that the Commission's decision is justiciable.

OUR DECISION

[44] Having perused the appeal records and after hearing parties oral submission as well as written submissions, we find merits in the appeal. The respondent was aware and confessed to his shortcomings when he replied the show cause letter. The letters of support from Ketua Polis Daerah Ipoh and Ketua Jabatan Siasatan Jenayah was for administrative process and cannot be interpreted as giving him a legitimate expectation of being confirmed. His probation period of three years was extended to give him opportunity to improve himself. He did not improve himself, which led to his Head of Department's refusal to confirm him in the service. Regulation 31(2) of the 2012 Regulations is clear in that a probationer remains a probationer until he is confirmed.

[45] Based on the circumstances of the case, this court cannot say the decision of the Commission had been illegal, irrational or procedurally defective such as to justify this court substituting its discretion whether or not to confirm a probationer for that of the Commission. The appeal is therefore allowed. The decision of the High Court is set aside. We award costs of RM10,000 here and below to the appellants.

Appeal allowed with costs.

Reported by Muhamad Azham Marwan